BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CITIZENS TO PRESERVE THE UPPER SNOHOMISH RIVER VALLEY, AL HIGHBERGER, SUZANNE and FRANK FENIMORE and JOHN WOLF, Petitioners, v. S-R BROADCASTING, SKOTDAL BROS. LLC and SNOHOMISH COUNTY, Respondents.	SHB NO. 06-022 ORDER DENYING SUMMARY JUDGMENT

Petitioners, Citizens to Preserve the Upper Snohomish River Valley, Al Highberger, Suzanne and Frank Fenimore and John Wolf, (Citizens) challenge the shoreline substantial development permit (SSDP) issued by Snohomish County allowing S-R Broadcasting, Skotdal Bros. LLC (S-R Broadcasting) to erect a digital broadcasting site, including transmission structures, within the floodplain of the Snohomish River. The Citizens have moved for summary judgment dismissing the appeal on the basis that the County's approval of the application is barred by the doctrine of collateral estoppel.

The Board, comprised of William H. Lynch, Kathleen D. Mix, Andrea McNamara Doyle[1], Judy Wilson, Mary Alyce Burleigh, and Dan Smalley considered the following material

[1] Board member McNamara Doyle would like to disclose, for the record, that she previously practiced at Davis Wright Tremaine LLP, the law firm representing S-R Broadcasting in this matter. She is acquainted with Charles Maduell. She had no involvement with or knowledge of the present matter during her tenure at the firm. She does

in ruling on this motion.

1. Petitioners' Motion for Summary Judgment.
2. Declaration of Jennifer A. Dold with Exhibits 1-16.
3. Response of S-R Broadcasting and Skotdal Bros. LLC.
4. Declaration of Charles E. Maduell with Exhibits A-R. (Exhibits S-U are attached, but not referenced in the Declaration).
5. Snohomish County's Memorandum in Opposition to Motion.
6. Petitioners' Reply in Support of Motion for Summary Judgment.
7. Second Declaration of Jennifer A. Dold with Exhibits 17-21.

Based upon the evidence submitted and the briefs of counsel, the Board enters the following decision.

Factual Background

S-R Broadcasting has been engaged in an effort to obtain approval for the construction of radio transmission towers on a parcel of property lying within the floodplain of the Snohomish River for approximately six years. S-R first applied to Snohomish County for permits to construct a new transmitter facility in October 2000. S-R is the owner and operator of radio station KRKO-AM, which provides citizens of Snohomish County with local programming, including news and public service information. The company would like to install a new transmitter in order to upgrade its current status as a Class B 5kW station to a full-powered station. (Maduell Declaration, Ex. P).

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not believe her prior affiliation with Davis Wright Tremaine will influence her impartiality in this matter, and she finds no basis for recusing herself from the case.

The project was proposed for a 40-acre site located at 11304 132nd SE, adjacent to Short School Road. (Maduell Declaration, Ex. Q). The property lies within the 100-year floodplain of the Snohomish River. The actual construction is approximately 550 feet landward of the ordinary high water mark of the Snohomish River and over 750 feet landward from the river's edge. (Maduell Declaration, Ex. B; Dold Declaration, Ex. 12). Under Snohomish County Code provisions, development within the 100-year floodplain falls under shoreline jurisdiction and can be undertaken only after obtaining a shoreline substantial development permit. The site in question has been designated a rural shoreline environment by Snohomish County. (Dold Declaration, Ex. 2).

The project site is located in the Upper Snohomish River Valley (USRV). The USRV in this area is a pastoral rural tableland used primarily for agriculture. The Craven Farm lies directly to the southeast of the S-R Broadcasting site. The farm is an example of destination agriculture and is developed with farm stand stores and special occasion facilities. A direct-market tree farm, Deb's U-Cut, is also in the general vicinity of the transmitter site. The Bob Heirman Wildlife Park occupies 343 acres on the west side of the northern portion of the USRV, and provides opportunities for wildlife viewing, outdoor education, and nature studies. The USRV is flanked by treed hillsides including Fiddler's Bluff on the west and Lord Hill on the east. These hillsides are developed with residential neighborhoods, and many of the dwellings take advantage of scenic views of the USRV floor. (Dold Declaration, Ex. 2, p. 7-9).

In October 2000, S-R submitted a master permit application to Snohomish County for an eight-antenna transmitter facility including five guy-wired antennas 466 feet tall (Phase I) and

three guy-wired antennas 425 feet tall (Phase II) plus one 816 square foot equipment shelter for each phase . The application included requests for a shoreline substantial development permit (SSDP) and a zoning conditional use permit (CUP). During the course of review and public comment on the proposal, S-R Broadcasting explored certain modifications to the original design. In 2001, S-R Broadcasting eliminated the guy-wires from the antenna structures to reduce impacts on wildlife. The modified proposal included one self-supporting antenna 425 feet high and three self-supporting antennas 199 feet high (Phase I) and four self-supporting antennas 199 feet high (Phase II). During the Deputy Hearing Examiner's consideration of the proposal, S-R indicated it would further reduce the height of the primary antenna to 349 feet, if necessary to mitigate the proposal's impacts. (Dold Declaration, Ex. 2, p. 9-10).

The Snohomish County Deputy Hearing Examiner conducted an extensive hearing on the proposal, which included a total of fourteen hearing days. The hearing involved the SSDP, the zoning CUP, and an appeal of a State Environmental Policy Act (SEPA) Determination of Non-Significance (DNS) issued by the County in connection with the project. The County, S-R Broadcasting, and Citizens to Preserve, all actively participated in the hearing examiner proceeding. The Deputy Hearing Examiner visited the site and surrounding area on thirteen separate occasions during the pendency of the application. Many of his observations were memorialized in an Exhibit 1164, made part of the hearing record, and relied upon as evidence in the decision. Three of the visits occurred after the hearing was concluded. (Maduell Declaration, Ex. L, Dold Declaration, Ex. 2, p.2).

The Snohomish County Deputy Hearing Examiner, Peter Donohue, issued a decision in the matter on July 31, 2002. The decision overturned the DNS in part and remanded the DNS to the County for preparation of an Environmental Impact Statement (EIS) on the issue of aesthetic and visual impacts of the project. At the same time he ruled that an EIS should be prepared, the Examiner also denied the zoning CUP[2] and SSDP based on failure to meet requirements of the Snohomish County Code (SCC) and the County's Shoreline Master Program. (SMP) (Dold Declaration, Ex. 2). As the legal basis for his ruling, the Examiner cited a Snohomish County Code provision addressing denial of a project when a SEPA DNS has been issued:

> When denial of a non-county proposal, for which early notice of whether a DS is likely to be issued or for which a DS has been issued, can be based on grounds which are ascertainable without preparation of an EIS, the responsible official may deny the application … without preparing an EIS in order to avoid incurring needless county and applicant expenses, subject to the following:
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> (1)Any such denial or recommendation of denial shall be supported by express written findings or conclusions of substantial conflict with adopted plans, ordinances, regulations or laws.
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> (2)When considering a recommendation of denial made pursuant to this section, the decision-making body may take one of the following actions:
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> (a) Deny the application;
> (b) Find that there is reasonable doubt that the recommended grounds for denial are sufficient and remand the application to the responsible official for compliance with the procedural requirements of this title.

[2] The Examiner denied the zoning CUP requested for the project. This decision was appealed to the Snohomish County Council. The Council overturned the Deputy Hearing Examiner's decision on several issues and delayed issuance of a final decision pending completion of the EIS on visual and aesthetic impacts. The Council ultimately approved the CUP in March 2006. (Maduell Declaration, Ex. C).

SCC 23.16.280 (now codified as SCC 30.61.220).

The Deputy Hearing Examiner's decision concluded that the antenna project failed to comply with several policies and guidelines in the Snohomish County SMP. The policies identified by the Examiner as grounds for denial focused on the aesthetic and visual impacts of the towers on the shoreline and the surrounding area. S-R Broadcasting moved for reconsideration of the decision and argued the Deputy Hearing Examiner should recuse himself from the case based upon the appearance of bias. (Maduell Declaration, Ex. O). Examiner Donahue did withdraw from further participation in the case and an Examiner Pro Tempore entered a ruling denying reconsideration. The Examiner Pro Tempore concluded Examiner Donahue's actions did not constitute a violation of appearance of fairness. (Maduell Declaration, Ex. M; Dold Declaration, Ex. 3).

S-R Broadcasting appealed the Examiner's SSDP decision to the Shorelines Hearings Board (SHB), but later withdrew the appeal. Prior to withdrawing the SHB appeal, S-R Broadcasting wrote to Snohomish County seeking confirmation that the company could refile a substantially similar application under the terms of a County Code provision which provides:

> After the final action regarding the denial of a shoreline substantial development, shoreline conditional use, or shoreline variance permit, reapplication for a permit involving substantially the same development on the property shall not be accepted for consideration for a period of six months.

SCC 30.44.340. (Dold Declaration, Ex. 6). The County responded to S-R in writing, indicating, "You are correct in your understanding of SCC 30.44.340 in that if SR Broadcasting were to withdraw it's shoreline appeal, they could resubmit a new SSDP application six months after the

final decision by the Hearing Examiner Pro Tem."[3] (Dold Declaration, Ex. 7). S-R Broadcasting then chose to withdraw its SHB appeal and an Order of Dismissal was issued by the SHB in May 2003. (Dold Declaration, Ex. 9).

S-R Broadcasting proceeded to prepare an EIS addressing the visual and aesthetic impacts associated with the project. The EIS concluded the antenna would impact views from various locations and that those impacts could not be entirely eliminated through mitigation. (Dold Declaration, Ex. 13). S-R used the EIS in connection with its application for the zoning CUP, which Snohomish County granted March 16, 2006. On or around March 20, 2006, S-R Broadcasting submitted a new SSDP application which included four self supporting AM signal transmission structures, one 349 feet tall, three 199 feet tall, together with an 816 square foot equipment shelter. (Dold Declaration, Ex. 12).

The 2006 application differed from the 2000 application in several ways. The 2006 application was accompanied by a Final Environmental Impact Statement (FEIS) and Addendum which resulted in SEPA conditions on the project. The number of antennas and the height of the towers were different from the original application in 2000, but virtually the same as the modified configuration actually analyzed by the Deputy Hearing Examiner in the 2002 decision. The application included the planting of a 100 foot wide buffer of native vegetation along the westerly property boundary and the boundary with parcel 1-003, as well as planting the

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[3] The letter also indicated Snohomish County would process and issue such a permit administratively, if the decision was to approve. If a denial was issued, the permit would be processed by the Hearing Examiner pursuant to SCC 30.44.240(2). Citizens contend this communication indicates an illicit agreement or "deal" was reached between the applicant and the County. The information before the Board fails to establish any impropriety or deviation from the law based solely on the written exchange regarding interpretation of County ordinances.

remainder of the perimeter of the site with a 100 foot wide buffer of hybrid poplars. The 2006 application did not include a second phase with additional antennas, although it is not entirely clear from the record whether the proposal considered by the Examiner in 2002 included a second phase. (Dold Declaration, Ex. 2, p. 9; Dold Declaration, Ex. 12). The changes in the 2006 application were specifically directed to the visual and aesthetic issues raised by the Deputy Hearing Examiner in 2002 as the basis for denial of the SSDP.

The County administratively issued a SSDP to S-R Broadcasting in June 2006. (Dold Declaration, Ex. 4). Citizens appealed the SSDP approval to the SHB in this action. The summary judgment motion before the Board raises the issue of whether the County's approval of S-R Broadcasting's 2006 SSDP application is barred under the doctrine of collateral estoppel, based on the Hearing Examiner's decision denying S-R's Broadcasting's similar application in 2002.

Analysis

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). All facts and reasonable inferences must be construed in favor of the nonmoving party in a summary judgment. The facts relevant to deciding this motion are not in dispute and the matter is ripe for summary judgment.

The issue presented to the Board for resolution in this motion is whether the County was allowed to substantively consider S-R Broadcasting's second application for construction of radio antennas when a substantially similar project had been denied by the Deputy Hearing Examiner in 2002. Proper County action on the second application for a similar project cannot be evaluated without considering the Snohomish County ordinance specifically addressing sequential shoreline applications. Snohomish County has adopted a provision allowing subsequent applications for substantially the same project that has been denied, if the application is filed no less than six months after the original denial:

> After the final action regarding the denial of a shoreline substantial development, shoreline conditional use, or shoreline variance permit, reapplication for a permit involving substantially the same development on the property shall not be accepted for consideration for a period of six months.

SCC 30.44.340. The County has the authority to establish a statutory process that differs from common law preclusion doctrines and it has done so in adopting SCC 30.44.340. *Hilltop Terrace Homeowners' Assoc. v. Island Cy.*, 126 Wn.2d 22, 33, 891 P.2d 29 (1995).

Citizens contend the provisions of SCC 30.44.340 may allow an entity to resubmit an application, but do not allow the County to consider any substantive items decided against the applicant in the first application. The Board finds this interpretation unpersuasive. If the County cannot consider the re-application's treatment of any item forming the basis for a prior denial, re-application could never be anything but a futile gesture. All previously denied applications would have to be denied again, despite any changes made to address the deficiencies. The Board, in interpreting a statute or ordinance, is to construe the language in a manner that gives each word and clause effect and renders no part meaningless or superfluous. *Hangartner v. Seattle*, 151, Wn.2d 439, 451, 90 P.3d 26 (2004). Unlikely, absurd, or strained consequences should be avoided. *State v. McDougal,* 120 Wn.2d 334, 350, 841 P.2d 1232 (1992).[4]

The Snohomish County enactment in question, by its terms, allows an unsuccessful applicant to refile for substantially the same project after the passage of six months. In this case, the applicant, S-R Broadcasting, filed a new application with additional information and conditions designed to address the issue of visual and aesthetic impacts. The new application was accompanied by a FEIS and supplement addressing visual and aesthetic impacts in considerable detail. Visual buffering was proposed for the first time through the planting of native vegetation and poplar trees. The height reductions, lighting, and elimination of Phase 2,

[4] The Board acknowledges the Petitioner's argument that the Snohomish County ordinance could allow project proponents to refile numerous times for the same project that has been denied. However, the Board concludes that the substantial costs associated with preparing and filing successive, modified, applications will provide some constraint on re-submissions. Moreover, the small likelihood of obtaining a different ruling from the County merely by re-filing the identical application, without making any modifications to address the basis for the prior denials will also serve to prevent multiple re-applications.

that were discussed during the prior application process and hearing, were formally incorporated into the new application.

The facts of this case fall within the scope of SCC 30.44.340. The 2006 application was modified in ways that were designed to remedy the visual and aesthetic concerns that formed the basis for the deficiencies the Deputy Hearing Examiner found in the prior application. The terms of SCC 30.44.340 allow an applicant, like S-R Broadcasting, to file a new application after being denied approval of a substantially similar project. The language further contemplates that the County will consider the merits of the application when it states that the application will be "accepted for consideration" after six months. SCC 30.44.340 cannot be reasonably construed to prevent substantive consideration of an application revised to respond to the very issues forming the basis for its prior denial. The County properly considered the S-R Broadcasting application pursuant to SCC 30.44.340 and issued an approval. Citizens have appealed the approval, and have the right to contest the merits of the County's decision before this Board. Snohomish County was not precluded from considering S-R Broadcasting's 2006 application and accordingly, the Citizens' Motion for Summary Judgment is denied.

The Board has concluded the terms of SCC 30.44.340 allow an applicant to refile a shoreline application designed to address prior deficiencies, and further allow the County to substantively consider such application. Citizens contend the doctrine of collateral estoppel should nevertheless apply to bar the County from considering the merits of an application substantially similar to a project previously denied. The Board disagrees; however, even if the

common law doctrine of collateral estoppel were applicable to the S-R Broadcasting application, the prerequisites for its use have not been established.

A four-part test exists for determining whether previous litigation of specific issues should bar their consideration in subsequent litigation:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with the party to the prior adjudication; and (4) application of the doctrine must not work an injustice in the party against whom the doctrine is to be applied.

Southcenter Joint Venture v. National Democratic Policy Committee, 113 Wn.2d 413, 418, 780 P.2d 1252 (1989) citing *Shoemaker v. City of Bremerton,* 109 Wn.2d 504, 507, 745 P.2d 858 (1987). In this case, the issues to be decided are not identical. The prior decision evaluated whether the project, as it was then configured, met the provisions of the Snohomish SMP. The issue in the present case is whether the project's new configuration, including vegetative buffering, meets the provisions of the Snohomish SMP. While the issues are similar, they are not identical. The impact of providing vegetative buffering was not decided in the 2002 Deputy Hearing Examiner decision. There is also a substantial question whether the Deputy Hearing Examiner's ruling was a final judgment on the merits, given its direction to the County to prepare an EIS.

In addition, the moving party has not demonstrated application of the doctrine will not work an injustice on the party against whom it is being applied, particularly in light of some of the procedural oddities of the case. The record in this case reveals that the Deputy Hearing Examiner recused himself after the decision was rendered. The recusal was based on the fact

that the Examiner personally visited the site on thirteen separate occasions. He memorialized many of his observations in a document that was introduced into evidence and he relied on that evidence in rendering his decision. Some observation of a site may be appropriate, but the Examiner's level of personal involvement a case pending before him was quite unusual. Reconsideration was undertaken by a different Hearing Examiner.

The issue of procedural fairness is also raised by the fact that the County gave specific written confirmation that S-R Broadcasting could refile a new application after the passage of six months and that such an application would be considered. The letter to S-R Broadcasting from Snohomish County certainly contemplated the possibility of an approval when it outlined a different procedure for action depending on whether the decision was an approval or a denial. Given the totality of the circumstances surrounding the decision, the SHB appeal and withdrawal of the prior SHB case, it would be an injustice to preclude the applicant from having the County substantively consider the revised application. In the absence of all four prongs of the collateral estoppel test, it is not properly applied in this instance to bar the County from substantively considering S-R Broadcasting's 2006 application.

Based on the foregoing analysis, the Board enters the following:

ORDER

The Petitioners' Motion for Summary Judgment is denied. The Petitioners' appeal of

Snohomish County's permit approval will proceed to hearing on all issues.

DONE this 3rd day of October 2006

SHORELINES HEARINGS BOARD

William H. Lynch, Chair

Kathleen D. Mix

Andrea McNamara Doyle

Judy Wilson

Mary Alyce Burleigh

Dan Smalley

Phyllis K. Macleod
Administrative Appeals Judge